No. 73-806

NOV 30 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NATIONAL PETROLEUM REFINERS ASSOCIATION, ET AL.,
Petitioners,

v.

FEDERAL TRADE COMMISSION, ET AL., *Respondents*

BRIEF ON BEHALF OF THE AMERICAN BANKERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

MATTHEW HALE
General Counsel
The American Bankers Association
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036
Attorney for Amicus Curiae

November 30, 1973

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

Page

General Statement 1

Interest of Amicus Curiae 2

The Significance of the Decision of the Court of Appeals that the FTC has Authority to Issue Legislative Rules 6

The Congress Needs a Definitive Ruling Now 13

Conclusion 15

LIST OF CITATIONS

CASES:

Bristol-Myers Co. v. *FTC,* 284 F.Supp. 745 (D.D.C. 1968), *aff'd in pertinent part,* 424 F.2d 935 (D.C. Cir. 1970), *cert. denied,* 400 U.S. 824 (1970) 7

Lever Bros. v. *FTC,* 325 F.Supp. 371 (D. Me. 1971). 7

Mourning v. *Family Publications Services, Inc.,* 411 U.S. 356 (1973). 11

STATUTES—FEDERAL:

Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331, 79 Stat. 282 (1965). 8

Fair Packaging and Labeling Act, 15 U.S.C. §§ 1451 ff., 80 Stat. 1296 (1966). 6

Federal Trade Commission Act, 15 U.S.C. §§ 41 ff., 38 Stat. 717 (1914), 52 Stat. 111 (1938). 1, 3, 6-7 12, 14

15 U.S.C. § 45 ..... 1, 3, 6, 7

15 U.S.C. § 46 12

Flammable Fabrics Act, 15 U.S.C. §§ 1191 ff., 67 Stat. 111 (1953) 6, 11

Page

Fur Products Labeling Act, 15 U.S.C. § 69, 65 Stat. 175 (1951). 6, 11

Interstate Commerce Act, 49 U.S.C. §§ 1 ff., 24 Stat. 379 (1887) 7

National Bank Act, 12 U.S.C. §§ 21 ff., 13 Stat. 99 (1864) 2

Securities Act of 1933, 15 U.S.C. §§ 77a ff., 26 Stat. 209 (1890). 9

Sherman Anti-Trust Act, 15 U.S.C. §§ 1 ff., 26 Stat. 209 (1890). 8

Truth in Lending Act, 15 U.S.C. §§ 1601 ff., 82 Stat. 146 (1968). 9, 11-12, 14

15 U.S.C. § 1604 11
15 U.S.C. § 1607 12
15 U.S.C. § 1611 12
15 U.S.C. § 1642 8

STATUTES—STATE:

Calif. Civil Code:

Retail Installment Sales Act, §§ 1804.1, 1804.2, 1810.7 5

Automobile Sales Finance Act, §§ 2983.5, 2983.7 5

Credit Cards, § 1747.90 5

D.C. Code, Consumer Credit Protection Act, §§ 28-3807-3809 5

Uniform Commercial Code 4, 10

Uniform Consumer Credit Code, National Conference of Commissioners on Uniform State Laws, approved by the American Bar Association, August 7, 1968: 5

Colorado Rev. Stat. § 73-1-101;
Idaho Laws 1971, Ch. 299;

Page

Indiana Code of 1971 § 19-21-101;
Oklahoma Laws 1969, Title 14A §1-101;
Utah Code Annotated, Ch. 9;
Wyoming Code Annotated, §§ 40-1-101 to 40-9-103.

BILLS, HEARINGS, AND REPORTS:

Consumer Product Warranties—FTC Improvements:

S. 986, 92d Cong., 1st Sess., February 25, 1971 ... 14

H.R. 4809, 92d Cong., 1st Sess., February 23, 1971 14

H.R. 20, 93d Cong., 1st Sess., January 3, 1973..3, 9-10 and

H.R. 5021, 93d Cong., 1st Sess., March 1, 1973:

Hearings before the Subcommittee on Commerce and Finance of the House Committee on Interstate and Foreign Commerce, Serial No. 93-17, at 80, 88, March 19, 1973 .....3, 10

S. 356, 93d Cong., 1st Sess., January 12, 1973..9, 13-14

S. Rep. No. 93-151, May 14, 1973 13
S. Rep. No. 93-280, June 28, 1973 14
119 Cong. Rec. S16421 (daily ed., September 12, 1973) 14

H.R. 7917, 93d Cong., 1st Sess., May 17, 1973..9, 13-14

Fair Credit Billing:

S. 2101, 93d Cong., 1st Sess., June 28, 1973 ..... 5, 9

119 Cong. Rec. S14403 (daily ed., July 23, 1973) 5

Hearings before a Subcommittee of the House Committee on Appropriations on Agriculture—Environmental and Consumer Protection Appropriations for 1974, 93d Cong., 1st Sess., Part 6, Consumer Programs, at 926 10

Page

REGULATIONS:

FTC Rules of Practice

27 Fed. Reg. 4636, 4796 6

FTC Trade Regulation Rules (16 C.F.R. §§ 400-429

Cigarette Labeling, 16 C.F.R. § 408 (superseded by 15 U.S.C. §1331). 8

Games of Chance in the Food Retailing and Gasoline Industries, 16 C.F.R. § 419 8

Mailing of Unsolicited Credit Cards, 16 C.F.R. § 421, 35 Fed. Reg. 4614 (superseded by 15 U.S.C. § 1642) 8

Octane Posting, 16 C.F.R. § 422 ..... 1-2, 8

34 Fed. Reg. 12449 1

36 Fed. Reg. 354 2

36 Fed. Reg. 7309 2

36 Fed. Reg. 23871 2

Door-to-Door Sales, 16 C.F.R. § 429 (effective date to be announced) 8

Proposed FTC Trade Regulation Rules

Sale of Franchises, 36 Fed. Reg. 21607, 22187 8

Preservation of Buyers' Claims and Defenses in Consumer Installment Sales 3-6, 8, 10

36 Fed. Reg. 1211, 6592, and 7865 4

37 Fed. Reg. 892 4

MISCELLANEOUS:

28 The Business Lawyer 641 5

FTC Press Release dated July 17, 1973 8-9

Report of the National Commission on Consumer Finance, December 1972 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-806

NATIONAL PETROLEUM REFINERS ASSOCIATION, ET AL.,
Petitioners,

v.

FEDERAL TRADE COMMISSION, ET AL., *Respondents*

BRIEF ON BEHALF OF THE AMERICAN BANKERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

GENERAL STATEMENT

On June 30, 1969, the Federal Trade Commission (FTC) published a proposed Trade Regulation Rule (34 Fed. Reg. 12449) declaring that failure to post octane numbers on gasoline pumps at service stations would be an "unfair method of competition" and a "deceptive act or practice" within the meaning of section 5 of the Federal Trade Commission Act (15 U.S.C. § 45). Following hearings and the sub-

mission of comments by interested parties, and issuance of a revised Rule (36 Fed. Reg. 354, December 30, 1970), later postponed (36 Fed. Reg. 7309), a substantially revised Octane Posting Rule was issued on December 16, 1971, to be effective March 15, 1972 (36 Fed. Reg. 23871).

This case was instituted on March 29, 1971 by two trade associations and 34 gasoline refining companies in order to test the authority of the FTC to promulgate legislative rules such as the Octane Posting Rule. The District Court for the District of Columbia granted plaintiffs' motion for summary judgment on April 4, 1972 (340 F.Supp. 1343). The Court of Appeals for the District of Columbia, on June 27, 1973, reversed the District Court, holding that the FTC has power to issue such legislative rules (482 F.2d 672).

The plaintiffs have petitioned this Court for a writ of certiorari, filed November 20, 1973. The American Bankers Association submits this brief as amicus curiae in support of the request for review of the decision of the Court of Appeals. Consent of the Government and of the petitioners has been obtained by letters dated November 14, 1973.

INTEREST OF AMICUS CURIAE

The American Bankers Association is a trade association having as its members some 13,500 banks. About 4,500 of these banks are national banking associations, chartered, examined, and supervised by the Comptroller of the Currency under the National Bank Act, and about 9,000 are State banks chartered under the banking codes of the several States and examined and supervised both by the appropriate State banking supervisory officials and, in most cases,

also either by the Board of Governors of the Federal Reserve System (in the case of State member banks) or by the Federal Deposit Insurance Corporation (in the case of State nonmember insured banks).

Even though expressly exempted from the FTC Act (15 U.S.C. § 45 (a)(6)), banks can be substantially affected by rules of the Federal Trade Commission.[1] For example, in 1971 the FTC published a proposed Trade Regulation Rule entitled "Preservation of

---

[1] In a statement supplied by the FTC for the record after its testimony had been completed at the 1973 hearings on the Consumer Product Warranties—FTC Improvements bills, the FTC has taken an extremely narrow view of the exemption for banks.

> Opinion as to Whether Rulemaking Extends to Financial Institutions
>
> In providing the Commission jurisdiction over unfair methods of competition and unfair or deceptive act or practices in commerce, Section 5 of the Federal Trade Commission Act excepts "banks" and a number of other specific categories of business from the Commission's enforcement authority under that section. No exception is made by Section 5 for financial institutions other than banks.
>
> The Commission believes, however, that it would clearly defeat the policy and provisions of the Act to hold that the exemption accorded to banks must be construed to embrace even those activities which lie outside the sphere of a bank's essential functions and are not incidental to those functions. We believe, therefore, that our rules of general application do extend to activities which are carried on by banks in common with other types of business institutions. (Hearings before the Subcommittee on Commerce and Finance of the House Committee on Interstate and Foreign Commerce, on H.R. 20 and H.R. 5021, 93d Cong., 1st Sess., Serial No. 93-17, at 80, March 19, 1973.)

This Association, of course, disagrees completely with this novel interpretation. While the scope of the exemption for banks is not relevant to this case, the position taken by the FTC in its opinion gives the members of this Association an additional basis for interest in the authority of the FTC to issue legislative rules.

Buyers' Claims and Defenses in Consumer Installment Sales" (36 Fed. Reg. 1211, 6592, and 7865, January 26, April 7, and 27, 1971; 37 Fed. Reg. 892, January 5, 1973), which would have abolished the holder in due course doctrine and waiver of defense provisions in consumer installment obligations and credit card agreements. This Association, the Consumer Bankers Association, and the two major bank card associations —Interbank Card Association and National Bank-Americard, Inc.—filed a total of five statements at various stages of this proceeding, objecting to the proposed rule on several grounds including the argument that the FTC has no authority to issue legislative rules.

The proposed rule would prohibit merchants from acquiring from customers any obligations subject to the holder in due course doctrine or any credit card obligations based on an agreement between the card issuer and the card holder which contained a waiver of defense provision. While this rule on its face applies only to the relations between merchants and their customers, the effect on the banks which have been financing these transactions by the purchase of consumer paper or through bank card systems is direct and substantial. The proposal would cut across the complex and highly integrated network of State laws applicable to bank transactions, including the Uniform Commercial Code, and it would require substantial alterations to bank card arrangements, possibly to the extent of making bank card systems unworkable.[2] The FTC has not yet taken final action on this rule.

---

[2] Many States have enacted statutes restricting the effectiveness of the holder in due course doctrine in consumer transactions and waiver of defense provision in credit card agreements (see, for

The importance of consumer credit to the nation's economy, as well as to consumers, may be seen from the following table.

CREDIT OUTSTANDING TO INDIVIDUALS

($ Billions)

Year End	Consumer Credit Outstanding			1-4 Family Mortgage Debt Outstanding
	Installment	Noninstallment	Total	
1939	4.5	2.7	7.2	16.3
1945	2.5	3.2	5.7	18.6
1955	28.9	9.9	38.8	88.2
1965	71.3	19.0	90.3	212.9
1970	101.2	25.6	126.8	280.2
1971	109.5	27.7	137.2	307.8
1972	127.3	30.2	157.5	346.1

Source: Federal Reserve Board

The rule on Preservation of Buyers' Claims and Defenses would affect consumer transactions. The rulemaking authority of the FTC, as interpreted by the Court of Appeals, would apply equally to industrial and commercial activities of all sorts (other than those of the exempted concerns), and indirect effects on

example, Calif. Civil Code § 1747.90, § 1804.1, 2, § 1810.7, and § 2983.5, 7; D. C. Code §§28-3807-3809). The National Conference of Commissioners on Uniform State Laws spent years in drafting the Uniform Consumer Credit Code, approved by the Conference and the American Bar Association in 1968, in an effort to present a balanced and integrated proposal for the reform of consumer credit laws, including restrictions on the holder in due course and waiver of defense doctrines. This Code has been adopted in six States (28 The Business Lawyer 641, footnote 6). The Senate on July 23, 1973, passed S. 2101, 93d Congress, which would impose restrictions on waiver of defense provisions in credit card transactions (119 Cong. Rec., p. S14403, daily ed., July 23, 1973).

banks and other exempt industries can be expected as in the case of that Rule.

Accordingly, in spite of the exemption for banks expressly provided in the FTC Act, the banks which are members of this Association have a real and substantial interest in the question of the authority of the FTC to issue legislative rules.

THE SIGNIFICANCE OF THE DECISION OF THE COURT OF APPEALS THAT THE FTC HAS AUTHORITY TO ISSUE LEGISLATIVE RULES

Up until some 10 years ago the FTC limited its enforcement activities under the FTC Act to quasi-judicial proceedings, directed at individual concerns, on the basis of specific charges, responses, and adversary hearings, as expressly provided in section 5 of the Act.[3]

In 1962 the FTC formally announced that it would undertake rulemaking proceedings and would issue Trade Regulation Rules, which it is now clear would be generally applicable and would have the force and effect of law (27 Fed. Reg. 4636, 4796).

In this case for the first time since the creation of the FTC the courts are faced with the question

---

[3] The FTC was specifically granted authority to issue rules and regulations under several statutes which declared that misbranding or false labeling of certain products was an unfair method of competition and an unfair and deceptive act or practice and therefore unlawful under the FTC Act, and which authorized FTC to spell out in rules what was correct and what was false labeling: for example, the Fur Products Labeling Act, 15 U.S.C. § 69 (1951); the Flammable Fabrics Act, 15 U.S.C. §§ 1191 ff. (1953); and the Fair Packaging and Labeling Act, 15 U.S.C. §§ 1451 ff. (1966).

whether the FTC Act permits this new departure from its original practice.[4]

Section 5 of the FTC Act, as enacted in 1914, declared "unfair methods of competition in commerce" unlawful, and authorized the FTC to prevent persons, partnerships, or corporations, except banks and common carriers subject to the Interstate Commerce Act, from using such methods; it also directed the FTC to initiate a proceeding against any such person, partnership or corporation which it has reason to believe is or has been using "any unfair method of competition" (38 Stat. 717). In 1938 the section was amended by adding to the proscribed activities "unfair or deceptive acts or practices" and any "unfair or deceptive act or practice" (52 Stat. 111). The exemption for banks and common carriers has been broadened to include certain regulated air carriers and certain regulated packers and stockyards.

The field of authority of the FTC covers the entire sweep of the commerce clause, with these very limited exceptions. The FTC's power within this field is equally broad—to prevent "any unfair method of competition", or any "unfair or deceptive act or practice".

The authority to institute specific quasi-judicial proceedings against unfair methods of competition under this authority is a powerful instrument, which was felt to be necessary in 1914 because formal judicial

[4] In Bristol-Myers Co. v. FTC, 284 F.Supp. 745 (D.D.C. 1968), *aff'd in pertinent part*, 424 F.2d 935 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 824 (1970); and Lever Bros. v. FTC, 325 F.Supp. 371 (D. Me. 1971), the courts refused to enjoin proceedings preliminary to the issuance of Trade Regulation Rules, because the proposed rules, prior to promulgation, were not ripe for adjudication.

proceedings under the Sherman Anti-Trust Act had not accomplished all that the Congress felt was needed. Its effectiveness was increased in 1938, when unfair or deceptive practices were also prohibited.

To transform the FTC's authority to conduct these case-by-case quasi-judicial proceedings into a delegation of Congressional legislative authority to issue legislative rules covering virtually the entire field of commerce and any unfair method of competition and any unfair or deceptive act or practice is a major step, with incalculable effects on the nation's economy, on Congressional responsibilities, and on Federal-State relationships.

The extraordinary scope of the authority claimed, and its virtually limitless effect on the nation's economy and on the Federal system of government, may be judged by a few examples of the kinds of situations where the FTC has already asserted that the authority would permit them to act: cigarette labeling (16 C.F.R. § 408, superseded by 15 U.S.C. § 1331); games of chance in the food retailing and gasoline industries (16 C.F.R. § 419); mailing unsolicited credit cards (16 C.F.R. § 421, superseded by 15 U.S.C. § 1642); Cooling Off Period for Door-to-Door Sales (16 C.F.R. § 429, effective date to be announced); the proposed rule on Preservation of Buyers' Claims and Defenses in Consumer Installment Sales, discussed above; a proposed rule on the sale of franchises (36 Fed. Reg. 21607, 22187); and the Octane Posting Rule involved in the present case (16 C.F.R. § 422). (For other examples, see 16 C.F.R. §§ 400-429.)

The FTC has made it clear, in a press release issued July 17, 1973 announcing a realignment of its Bureau

of Consumer Protection, that it plans to make full use of this rulemaking authority:

> In view of the recent Court of Appeals' decision in the *Octane* trade regulation rule proceeding, a main thrust of the Bureau's work should be a definitional one—further fleshing out the meaning of "unfairness" and "deception." Effective use of our rulemaking authority is absolutely essential to carry out this assignment.
>
> Since rulemaking is so essential to the work of the *entire* Bureau, the separate division which has handled it exclusively has been eliminated and instead the various operating divisions will be responsible for developing rules. This will give all Bureau attorneys the option to proceed either by rulemaking or by litigation in the areas where they have developed substantive expertise.

The authority claimed by the FTC to issue legislative rules covering any unfair method of competition and any unfair or deceptive acts or practices in commerce would appear to enable the FTC to regulate almost all of the economy of the United States. It would enable the FTC to take over a substantial part of Congressional responsibilities—for example, it would seem that most disclosure provisions in the Truth in Lending Act (15 U.S.C. §§ 1601 ff.) and the Securities Act of 1933 (15 U.S.C. §§ 77a ff.), and many provisions of pending bills, for example, the Fair Credit Billing bill (S. 2101, 93d Congress), and the Consumer Product Warranties bills (S. 356, H. R. 20, H.R. 7917, 93d Congress) might well have been or could be issued as Trade Regulation Rules under the FTC's assertion of authority.

In addition it would seem that the authority claimed by the FTC would enable it to negate or supersede

many State laws. The proposal on Preservation of Buyers' Claims and Defenses would supersede parts of the Uniform Commercial Code. It has been suggested that the FTC might issue rules concerning the interest practices of lending institutions, presumably superseding State usury statutes.[5]

The FTC has reported to the House Appropriations Committee, in its budget request for FY 1974, that it is making a study of the debtor-creditor relationship, including the fairness of such remedies as blanket security interests, repossessions, deficiency judgments, wage assignments, cognovit notes, and acceleration clauses. The FTC went on to indicate that it might issue rules covering the field of creditors' remedies and other aspects of consumer contracts.

> If the Commission's rulemaking authority is reinstated, the results of this study will be utilized to assist in the development of a model retail installment contract. Such a contract could be mandated throughout the industry as a trade regulation rule. . . .[6]

Whatever may be thought of the merits of these proposals—and this Association has supported many legislative proposals in this field—it seems clear that a delegation to an agency which would enable it to undertake such a broad program of regulation of the economy, which would enable it to take over such substantial Congressional functions, and which would

---

[5] Hearings before the Subcommittee on Commerce and Finance of the House Committee on Interstate and Foreign Commerce, on H.R. 20 and H.R. 5021, 93d Cong., 1st Sess., Serial No. 93-17, at 88, March 19, 1973.

[6] Hearings before a Subcommittee of the House Committee on Appropriations on Agriculture—Environmental and Consumer Protection Appropriations for 1974, 93d Congress, 1st Session, Part 6, *Consumer Programs*, at 926.

enable it to supersede such a large body of State legislation, would have the gravest consequences both to our economy and to our system of government.

Unlike the authority delegated to the FTC to issue rules filling in the gaps and defining terms within the framework of fairly detailed and specific statutes like the Fur Products Labeling Act and the Flammable Fabrics Act, the broad and sweeping authority asserted by the FTC is the kind of legislative authority vested in the Congress and the State legislatures by the Federal and State constitutions. The issues are true legislative issues, involving conflicting public interests of substantial moment, which under the Constitution have been and should be decided by legislatures elected by and responsible to the voter.

Such a major delegation of legislative authority from the Congress to an agency, if such powers can constitutionally be delegated, should be conferred in the clearest and most explicit terms; it should not be inferred from ambiguous provisions in statutes.

Earlier this year this Court considered the Federal Reserve Board's authority to issue legislative rules under the Truth in Lending Act in *Mourning* v. *Family Publications Services, Inc.*, 411 U.S. 356 (1973), and upheld the rule involved. The Truth in Lending Act covers a limited sphere of activity—principally the disclosure of certain information about consumer credit—and it contains explicit and detailed statutory provisions covering much of the field. Nevertheless, the Committee reports and floor discussions of the bill make it abundantly clear that legislative rulemaking authority within the specific framework of the Act was considered essential. Section 105 of the Act, accordingly, contains a very broad and very specific provision requiring the Board

to prescribe regulations to carry out the purposes of the Act, with express authorization for such classifications, differentiations, or other provisions, and for such adjustments and exceptions, as in the judgment of the Board may be necessary or proper to effectuate the purposes of the Act, to prevent circumvention or evasion or to facilitate compliance. The provisions for administrative enforcement in section 108 apply clearly to any requirements imposed under the Act, and section 112 provides criminal penalties for a creditor who gives false or inaccurate information or who fails to provide information "he is required to disclose under the provisions of this title or any regulation issued thereunder." The distinction between the Board's legislative rules and the procedural rules of other agencies is emphasized in subsection 108(d), which provides that the authority of the Board to issue regulations does not impair the authority of any of the enforcement agencies "to make rules respecting its own procedures in enforcing compliance with requirements imposed under this title".

The limited provision in section 6 of the FTC Act authorizing the FTC to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of the Act, included as the seventh paragraph in a section concerning investigations, reporting, and other housekeeping matters, contrasts sharply with the broad and explicit rulemaking authority granted to the Federal Reserve Board contained in the Truth in Lending Act. The clear intent in the legislative history of the Truth in Lending Act to authorize the Board to issue substantive rules contrasts just as sharply with the negative legislative history of the FTC Act.

THE CONGRESS NEEDS A DEFINITIVE RULING NOW

A review of the decision of the Court of Appeals by this Court as to the authority of the FTC would eliminate the confusion and uncertainty which is apparent in the legislative proceedings of the current Congress.

On September 12, 1973 the Senate passed a bill, S. 356, 93d Congress, from which the Senate Commerce Committee struck a provision authorizing the FTC to issue legislative rules, under limited and restricted conditions. The FTC requested this change in the belief that the Court of Appeals would decide in this case that the FTC already had the authority without statutory limitations or restrictions (Senate Report No. 93-151, pp. 57-58). The Committee Report does not mention the deletion of the rulemaking provision, and it gives no indication whether the members of the Committee who deleted the provision shared the FTC's hope, or whether they did not want to grant this authority to the FTC, or whether they were anxious to pass the product warranty provisions of the bill and leave the decision on the rulemaking authority of the FTC to the courts or to later Congressional action.[7]

The Committee on Interstate and Foreign Commerce of the House of Representatives, on the other hand, is considering a bill, H.R. 7917, 93d Congress,

---

[7] Reprinting the FTC's letter in Committee Report No. 93-151 might suggest approval of the position taken in the letter. However, the following sentence, at page 9 of the same Report, appears to be a much stronger suggestion that the Senate Commerce Committee does not think the FTC has legislative rulemaking authority:

> "Thus the sole enforcement weapon available to the FTC to police the vast majority of consumer frauds, deception, and cheating has been the cease and desist order."

containing a provision similar to the provision deleted from S. 356, which would specifically authorize the FTC to issue substantive rules, under limited terms and conditions.[8]

Controversy over similar proposals to grant rulemaking authority to FTC was a significant factor in the failure of the 92d Congress to enact a Consumer Product Warranties bill (see S. 986 and H.R. 4809, 92d Congress).

Until the Congress has a clear and definitive statement from this Court as to whether the FTC already has legislative rulemaking authority under the existing FTC Act, it cannot legislate rationally in this field. A legislator who votes for S. 356 cannot know whether this vote is a vote for unrestricted legislative rulemaking authority for the FTC or a vote against any legislative rulemaking authority at all in the FTC. A legislator who votes for H.R. 7917 cannot know whether this vote is a vote to grant limited legislative rulemaking authority to the FTC or a vote to restrict ex-

---

[8] A New Title III was added to S. 356 by the Senate Committee on Banking, Housing and Urban Affairs in lieu of section 212 as reported in the Commerce Committee. This would give the Federal Reserve Board rulemaking authority with respect to unfair or deceptive practices of depository financial institutions, with enforcement delegated to the five supervisory agencies (S. Rep. No. 93-280). This Association supported this proposal, in the light of the limited area affected and in the light of the record of the Board's imaginative yet restrained rulemaking under the Truth in Lending Act (Report of the National Commission on Consumer Finance, December 1972, at 57). S. 356 was passed by the Senate on September 12, 1973 (119 Cong. Rec. S16421, daily ed., September 12, 1973). A similar provision was added to H.R. 7917 in the Subcommittee on Commerce and Finance of the House Committee on Interstate and Foreign Commerce before the bill was reported to the full Committee on November 12, 1973.

isting unlimited legislative rulemaking authority already in the FTC.

A clear and definitive statement of the effect of present law would enable the Congress to write into the new legislation whatever provisions it considers necessary to carry out its legislative policies.

CONCLUSION

In view of the vital issue raised by the decision of the Court of Appeals—the sweeping delegation of legislative rulemaking authority, with incalculable effects on Congressional responsibility, on Federal-State relationships, and on commercial activities in general and on banking in particular—The American Bankers Association urges this Court to grant the petition for a writ of certiorari.

Respectfully submitted,

MATTHEW HALE
General Counsel
The American Bankers Association
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036
Attorney for Amicus Curiae

November 30, 1973